STATE OF MICHIGAN
IN THE SUPREME COURT
(On Application for Leave to Appeal from the Court of Appeals, Bandstra, P.J., Fitzgerald and Sawyer, J.J.)

KENNETH R. DEYO,
Plaintiff-Appellant,

-vs-

VICKI E. DEYO,
Defendant-Appellee,

/

Supreme Court No.: 126795
Court of Appeals No.: 245210
Lower Court No.: 01-30982-DM

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126795

PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF

IN PREPARATION FOR ORAL ARGUMENT

PROOF OF SERVICE

ORAL ARGUMENT REQUESTED

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Dated: April 28, 2005

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STATEMENT OF JURISDICTION

Plaintiff-Appellant, on November 26, 2002, timely claimed his appeal from the Livingston County Circuit Court's Judgment of Divorce of November 19, 2002. The Judgment of Divorce was the first judgment that disposed of all the claims and liabilities of all the parties, and, thus, was a final order under MCR 7.202(7)(a)(1). Accordingly, the Court of Appeals had jurisdiction to hear this appeal under MCR 7.203(A)(1).

The Court of Appeals issued its decision on May 25, 2004. Plaintiff-Appellant timely moved for reconsideration on June 6, 2004. The Court of Appeals denied reconsideration on July 1, 2004. Plaintiff-Appellant filed his application within 42 days of that decision and, thus, this Court has jurisdiction to hear this matter under MCR 7.301(A)(2) and MCR 7.302(C)(2).

This supplemental brief is submitted by invitation of the Court conveyed in its April 1, 2005, order setting this matter for oral argument.

ISSUE PRESENTED

DID THE TRIAL COURT ERR IN AWARDING 100% OF THE MARITAL PROPERTY, AND, BEYOND THAT, HALF OF THE PLAINTIFF'S INHERITED FAMILY FARM, TO DEFENDANT-APPELLEE, MAKING HER AN UNDIVIDED TENANT IN COMMON ON SAID FARM, AND ALSO AWARDING HER $200.00 PER WEEK IN UNENDING ALIMONY, ALL ON THE BASIS OF ITS DETERMINATION THAT DEFENDANT BORE FAULT IN THE FAILURE OF THE MARRIAGE, DESPITE THE ABSENCE OF ANY CONTRIBUTION OF DEFENDANT TO THE INHERITANCE AND ANY IMPROVEMENT OR ACCUMULATION RESULTING THEREFROM?

The trial court answered this question: No.
The Court of Appeals answered this question: No.
The Dissenting Judge in the Court of Appeals answered this question: Yes.
Defendant-Appellee answers this question: No.
Plaintiff-Appellant answers this question: Yes.

INTRODUCTION

The arrival of this Court's Order of April 1, 2005, suggests that the Court has taken an interest in this case, quite possibly because the Court of Appeals decision below, as the dissent in that Court pointed out, deviated from both statute (MCL 552.401) and this Court's own precedent (*Dart v Dart,* 460 Mich 573; 597 NW2d 82 (1999)). As to the issues in this case, Plaintiff-Appellant relies on and incorporates by reference his brief in support of application in this matter. This supplemental brief is submitted, at the Court's invitation, to highlight those (few) cases which have addressed issues similar to the one which appears to have caught the Court's eye, and touch on the arguments Defendant-Appellee has offered the Court since Plaintiff-Appellant's original submission.

STATEMENT OF FACTS AND PROCEEDINGS

Given that the readers of this document will already have in hand Plaintiff-Appellant's Brief in Support of Application for Leave to Appeal, Plaintiff-Appellant incorporates his statement of facts therein by reference, and will not ask the read to again peruse the same material. The only additional note is that, on page 8 of Defendant-Appellee's Supplemental Brief, she claims that by caring for Plaintiff-Appellant's father, she somehow contributed to a more economical approach to caregiving, apparently making the argument that, by taking some part in caring for Mr. Quinney at home, on the cheap, she assisted in preserving more of his estate for inheritance than would have been present had he been placed in a nursing home. This argument was not made anywhere below, nor even to this Court until now (*see,* Defendant-Appellee's Court of Appeals Brief, p 1-4; Defendant-Appellee's Brief in Opposition to Application for Leave to Appeal here, p 6-8), and thus, while novel, is entirely unpreserved.[1]

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[1] It is also surprisingly crass to see such a thing written on paper. In essence Defendant-Appellee is claiming that Plaintiff-Appellant made decisions about his father's care with an eye solely toward asset preservation. While he cannot guess what Defendant was thinking at the time (and would not put anything past her), Mr. Deyo certainly did *not* make decisions about his father's care based on economics. Indeed, some of his decisions were quite costly, financially and otherwise. As for why he did not seek nursing home care for Mr. Quinney, most anyone who has visited such a place would not relish living there, and Mr. Deyo was quite certain his father, who prided himself on being an independent sort, would have hated seeing his life reduced to a series of group meals and intrusions by certified nurses aides. Sadly, given the effect of the Court of Appeals majority's holding, which threatens to reduce most any decision or action in regard to an in-law to a potential "contribution" toward inheritance, this sort of argument is likely to be seen again. Even worse, some people might actually heed the lower Court's decision and start acting like this. Not too long ago, most everyone in this country learned the importance of spelling out, very specifically, their wishes in a living will. Given the Court of Appeals holding, testators may well now have to spell out, very specifically, *why* they are leaving something to someone, lest it be attacked by someone else as "spoils" they contributed to. As will be discussed a bit more *infra,* the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq,* includes a very specific determination of what a will must contain to be valid. It is, respectively, not the place of the Courts to be adding provisions to that statute by judicial fiat.

ARGUMENT

DID THE TRIAL COURT ERR IN AWARDING 100% OF THE MARITAL PROPERTY, AND, BEYOND THAT, HALF OF THE PLAINTIFF'S INHERITED FAMILY FARM, TO DEFENDANT-APPELLEE, MAKING HER AN UNDIVIDED TENANT IN COMMON ON SAID FARM, AND ALSO AWARDING HER $200.00 PER WEEK IN UNENDING ALIMONY, ALL ON THE BASIS OF ITS DETERMINATION THAT DEFENDANT BORE FAULT IN THE FAILURE OF THE MARRIAGE, DESPITE THE ABSENCE OF ANY CONTRIBUTION OF DEFENDANT TO THE INHERITANCE AND ANY IMPROVEMENT OR ACCUMULATION RESULTING THEREFROM?

The trial court answered this question: No.
The Court of Appeals answered this question: No.
The Dissenting Judge in the Court of Appeals answered this question: Yes.
Defendant-Appellee answers this question: No.
Plaintiff-Appellant answers this question: Yes.

Standard of Review

In a divorce action, this Court reviews a trial court's factual findings for clear error. *Sparks v Sparks,* 440 Mich 141, 151; 485 NW2d 893 (1992). When the trial court's factual findings are upheld, its dispositional rulings are then reviewed for fairness and equatability in light of those facts. *Welling v Welling*, 233 Mich App 708, 709; 592 NW2d 822 (1999). Such dispositional rulings are discretionary with the trial court and should be affirmed unless this Court is left with the firm conviction that the division was inequitable. *Sands v Sands,* 442 Mich 30, 34; 497 NW2d 493 (1993); *Draggo v Draggo*, 223 Mich App 415, 429-430; 566 NW2d 642 (1997).

As this Court well knows, in general, trial courts are entrusted with broad discretion to fashion property distributions in divorce matters which are fair and equitable under all of the

circumstances. *Sparks v Sparks,* 440 Mich 141, 151-152; 485 NW2d 893 (1992). That said, however, in certain areas our Legislature has supplanted that discretion with particular rules which limit what can and cannot be done. Included among these areas where the boundaries of discretion are well defined is one issue central to this case, that of separate property. *See, e.g.,* MCL 552.23. Where issues of separate property are involved, rather than unfettered discretion, the Court can only depart from the norm, namely restoring the separate property to the party to whom it belongs, in very limited circumstances. *Reeves v Reeves,* 226 Mich App 490, 497-498; 575 NW2d 1 (1997).

What this Case is Not

Heretofore, and really even now, no one has raised an issue as to invasion of separate property based on need. With, by Plaintiff-Appellant's computations, some $698,634.55 in marital assets (*see,* Plaintiff-Appellant's Brief in Support of Application, p 45-46 for the math), and another $35,000 of separate assets for Defendant-Appellee, (*id.*), this is not a case where Plaintiff-Appellant will be left unable to support herself, regardless of what decision the Court might make on this issue. Accordingly, MCL 552.23(1)[2] simply does not apply to this case.

Contribution

This Court's April 1, 2005 order focuses, and rightly so, on whether the defendant

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[2] MCL 552.23(1) states:

Sec. 23. (1) Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage as are committed to the care and custody of either party, the court may further award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.

"contributed to the acquisition, improvement, or accumulation of the property." This language, of course, is statutorily based, and is drawn from MCL 552.401. That being the case, the statute's text itself is the mandatory starting point. *In re MCI Telecommunications Complaint,* 460 Mich 396; 596 NW2d 164 (1999). MCL 552.401 reads:

> Sec. 1. The circuit court of this state may include in any decree of divorce or of separate maintenance entered in the circuit court appropriate provisions awarding to a party all or a portion of the property, either real or personal, owned by his or her spouse, as appears to the court to be equitable under all the circumstances of the case, if it appears from the evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property. The decree, upon becoming final, shall have the same force and effect as a quitclaim deed of the real estate, if any, or a bill of sale of the personal property, if any, given by the party's spouse to the party. MCL 552.401.

This Court, which is often called on to itself serve reminders of such things, hardly needs a primer as to the rules of statutory construction.[3] To be sure, "[i]t is a fundamental principle of

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[3] Nonetheless, it is the job of every Appellant to provide citations for authority to the Court. Accordingly, "The primary goal of judicial interpretation of statutes is to ascertain and give effect to the Legislature's intent." *Chop v Zielinski*, 244 Mich App 677, 679; 624 NW2d 539 (2001), *citing Frankenmuth Mut Ins Co v Marlette Homes, Inc,* 456 Mich 511, 515; 573 NW2d 611 (1998). It is the precise language of the statute that is controlling. *People v Borchard-Ruhland*, 460 Mich 278; 597 NW2d 1 (1999). Where the plain and ordinary meaning of a statute is clear, judicial construction is neither necessary nor permitted. *Cherry Growers, Inc v*

statutory construction that the words used by the Legislature should be given their common ordinary meaning." *Hatch v Grand Haven Charter Twp,* 461 Mich 457, 465; 606 NW2d 633 (2000), *citing People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999). It may well be that contribute is such a commonly understood word that no further thought is needed, though Courts may look to a dictionary for guidance as to the common meaning of word. *See, Coblentz v City of Novi,* 264 Mich App 450, 460; 691 NW2d 22 (2004). *Websters* defines contribute as:

> **1:** to give or supply in common with others **2:** to supply (as an article) for publication **1 a:** to give a part to a common fund or store **b:** to play a significant part in bringing about an end or result **2:** to submit articles for publication. *Webster's Ninth New Collegiate Dictionary,* p 265, (Springfield, 1986).

Discarding the obviously inapplicable definitions, one is left with contribute meaning "to play a significant part in bringing about an end or result ." The Court of Appeals majority found that Defendant had indeed contributed, though getting there was not easy, even for it.

The Decision Below

The reasoning of the majority below was as follows:

> However, the trial court may award all or a portion of a party's separate assets to a spouse "if it appears from the evidence in the case that the party contributed to the acquisition, improvement, or

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Agricultural Marketing & Bargaining Bd, 240 Mich App 153, 166; 610 NW2d 613 (2000). In such cases, Courts will not speculate regarding the probable intent of the Legislature beyond the words expressed in the statute. *In re Schnell,* 214 Mich App 304, 310; 543 NW2d 11 (1995).

accumulation of the property." MCL 552.401. Recognizing that principle, the trial court factually determined that defendant's care of plaintiff's ailing father contributed to the inherited estate so that she should share in it:

> As the plaintiff's father began to fail over a period of two or three years, the defendant wife was involved in his care, bringing him meals and otherwise attempting to make his final days as comfortable as possible. There is no doubt that both parties were aware that some day there would be a large inheritance from his father, and the defendant wife reasonably expected that after 25 years she would benefit from it. For the most part, defendant did not relate well to her father-in-law, who did not like or trust women (He never married plaintiff's mother and, according to the plaintiff, did not treat her well). Despite her feelings, defendant did assist the father during his decline, and toward the end their relationship was better. . . .
>
> This Court believes that the wife's assistance in caring for the father as well as her continuation in the strained marriage for so many years created a

> situation whereby she did contribute to the inherited estate.

Based on the testimony at trial of defendant and Deborah Mathes concerning defendant's care of plaintiff's father before and during plaintiff's guardianship, and the trial court's determination that plaintiff's testimony to the contrary was not credible, the trial court's determination that defendant assisted in the care of plaintiff's father was not clearly erroneous. Further, there is no evidence in the record that plaintiff would have inherited his father's estate without defendant's assistance. Accordingly, we are not left with a definite and firm conviction that a mistake has been made, and the trial court's determination that defendant contributed to the acquisition of the inherited estate is not clearly erroneous. *Deyo v Deyo,* COA #245210 (May 25, 2004) [Attached Exhibit 1].[4]

The dissent, of course, saw it differently:

> A testator is free to dispose of his property as he wishes. MCL 700.1101 *et seq*. Plaintiff's father was, therefore, free to leave his property to unrelated persons or charities. However, while this

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[4] Plaintiff-Appellant has argued below, and in his brief in support of application here, that the trial court and Court of Appeals majority significantly over-credited Defendant-Appellee as to the period and amount of actual caregiving, which, when Mr. Quinney's itinerary and residences are carefully examined, would properly be measured in months and small amounts rather than years of countless toil. While Plaintiff-Appellant still maintains this position (because it is true), he does not expect that this Court is inclined to, or even really, given the jurisprudential significance of the question, should, decide this case based on factual issues.

statute can be used to support the trial court's inference that plaintiff's father left plaintiff his property in part *because* of defendant's care, it also supports the argument that plaintiff's father could have specifically included defendant in the inheritance had this been his reasoning. In the present case, the inherited property that was jointly owned and/or co-managed by the parties had already been included in the $ 714,634 marital estate as identified by plaintiff. There is no evidence in the record that plaintiff would not have inherited his father's estate without defendant's assistance; therefore, I am left with a definite and firm conviction that a mistake has been made so that the trial court's determination that defendant contributed to the acquisition of the inherited estate is clearly erroneous and would remand for a redetermination of the marital estate without consideration of the inheritance. . *Deyo v Deyo,* COA #245210 (May 25, 2004) [Attached Exhibit 1].

The Precise Question

Thus the matter for this Court, when considered properly in light of its position at the top, and thus providing guidance for, our One Court of Justice, is whether one can "contribute to the acquisition, improvement or accumulation or property" arrived at through inheritance simply by

providing care to the person who will one day become the testator of the property.[5]

Plaintiff-Appellant has endeavored to research the matter to provide the Court with cases presenting similar issues, from which guidance, or at least a pattern, might be found, but to little avail. The Court of Appeals has approved a divorce judgment that considered an inheritance to be separate property when directly questioned on that point. *Woodworth v Woodworth,* 12 Mich App 509; 163 NW2d 247 (1968). The Court did so, however, without directly addressing anything in regard to MCL 552.401.

The only other situation remotely close, in either published or recent (LEXIS-searchable) unpublished decisions was found in *Demman v Demman,* 195 Mich App 109; 489 NW2d 161 (1992). While a husband's separate property inheritance was invaded therein, the wife was cancer-stricken, and the husband healthy, and thus the finding was based on need, permissible under MCL 552.23(1), and would not address at all the question here.[6]

This Court's own forays into this area have also been limited. The most obvious and recent is *Dart v Dart* 460 Mich 573; 597 NW2d 82 (1999). Therein, much as here, the divorce

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[5] Again, this formation presumes that the Court will agree with the trial court's findings that Defendant-Appellee actually provided some measurable and significant amount of care. Plaintiff-Appellant certainly does not, and does not abandon the issue. The trial court's findings were supported by little more than Defendant-Appellee's self-serving and contradictory testimony (on the one hand, Mr. Quinney was a brute who behaved horribly toward women in general and her in particular, but on the other hand she gently hovered over him and tended him hand and foot), and, when compared to the record evidence, where Mr. Quinney lived and when he got sick, fall apart. Nonetheless, this Court's order focuses on a different aspect of this case, and understandably so. Plaintiff-Appellant simply offers this note for clarity and preservation purposes, and, having made the point, will need not return to it again.

[6] *Charlton v Charlton*, 397 Mich 84, 94; 243 NW2d 261 (1976) and *Grotelueschen v Grotelueschen*, 113 Mich App 395; 318 NW2d 227 (1982), *superceded by statute on other grounds, King v King*, 149 Mich App 495, 386 NW2d 562 (1986), would fall into this same category.

proceedings began shortly after the arrival of a (much more) sizable inheritance. *Id.* at 576-577; 597 NW2d at 83. In a case that focused largely on comity (whether England's judgment of divorce would be recognized) and did not reach an interesting jurisdictional issue (Plaintiff was served in England, where she was living, and countered by filing in Okemos, which she claimed to be her legal residence, leading to a 10 and 180 day jurisdictional question), this Court noted that "normally, property received by a married party as an inheritance, but kept separate from marital property, is deemed property not subject to distribution." *Dart* at 585; 597 NW2d at 87.

This Court relied on *Lee v Lee*, 191 Mich App 73; 477 NW2d 439 (1991), to support its statement in *Dart*. *Lee* dealt with a long term marriage, traded allegations of infidelity, and a multitude of claims of error, some of which the Court of Appeals credited. Included in this category was a finding of error where the trial court had failed to exclude the wife's inheritance from the marital estate. *Lee* recognized only two reasons that the trial court could have relied on to include the inheritance in the marital property pool, MCL 552.23 and MCL 552.401. As neither were applicable, the trial court erred in dividing the inheritance.

A Question of Definition

Accordingly, the authority is clear on a few key points. First, inheritance always starts out as separate property. *Dart; Lee*. That separate property, like all property in an equitable divorce proceeding, can be divided if, and only if, there is either need (MCL 552.23) or contribution (MCL 552.401). To date, and without question, contribution has been something that was objective and fairly easily defined. Joint effort toward improvement is certainly enough, *Reeves v Reeves*, 226 Mich App 490; 575 NW2d 1 (1997), to be called contribution and even just commingling, where the percentages of gain are not easily discerned in retrospect, may also be

sufficient. *McNamara v Horner,* 249 Mich App 177; 642 NW2d 385 (2002). While less concrete contributions to the household may be acceptable, *Hanaway v Hanaway,* 208 Mich App 278; 527 NW2d 792 (1995), this works only because they have clearly discernable results in the overall improvement of the marital lot.

While "acquisition, improvement, or accumulation" cover a good bit of ground, "contribute" is considerably more narrow. It is, according to *Websters*, "to play a significant part in bringing about an end or result." Here Mr. Deyo was Mr. Quinney's only child. Unless Mr. Deyo died first, or Anna Nicole Smith[7] latched on to Mr. Quinney, Plaintiff was always going to inherit his father's estate. While a testator, as the dissent rightly noted below, can leave his estate to whomever he devises, MCL 700.1101 *et seq*, the record is devoid of any indications that there was anyone, anywhere, whom Mr. Quinney could or would have left his estate to, other than his son.[8] Accordingly, this case comes down to a claim that Defendant "contributed" to the inheritance simply by being there and (if you believe her) being nice, to Plaintiff's father.

Even with this claim, the record is replete with indications that Defendant and Mr. Quinney did not get along. Moreover, there is no indication that the inheritance passed from father to son would have been any different *regardless* of what Defendant did. Had she cared for Mr. Quinney well, or left him hungry and dirty, had she hugged him regularly, or slapped him silly, nothing would have changed. Mr. Quinney would have had a certain amount of assets, and only one certain heir, his only son.

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[7] Anna Nicole Smith, a former Playboy model, married a ninety-some year old oilman and, for a brief while, stood to inherit $88 billion. Stein, *Anna Goes Prime Time,* Time (July 22, 2002).

[8] Had he died intestate, of course, Mr. Deyo also would have inherited his entire estate.

Larger Concerns

Had Mr Quinney wished to recognize Defendant's supposed care for him, he certainly could. Bequests in honor of such things are common enough. Instead, Mr. Quinney did nothing of the sort, and a trial judge, sitting in equity in a divorce, should not be permitted, long after the fact (for reasons that could have been known, or just as easily unimaginable, to the testator), to frustrate the intent of someone who has actually taken the time to dutifully comply with the EPIC requirements and author a valid will.

Moreover, the Legislature chose a specific word, "contribute." While our Courts have permitted this mandate to be met in a variety of ways, they have always, heretofore, been objectively determinable and concrete in result. Here the route authorized by the trial court and affirmed below is neither. If one contributes to inheritance simply be caring or being around the decedent, how much care is required? How nice is nice enough? Is just tolerance, certainly the level some people strive to barely reach toward some in-laws, enough? Maybe speaking to everyone twice a year (Thanksgiving and Christmas, being thankful that the table is long and the evening soon over) is enough. After all, if one does not check their tongue, Grandpa just might dis-inherit them.

Similarly, while "acquisition, improvement or accumulation" go a long ways, here it is impossible to tell if anything actually moved at all. Mr. Quinney's estate did not change, nor did Mr. Deyo's share thereof, because of anything that Defendant did, unless one credits her most recent argument, which is even worse. Under that view (it was cheaper to care for him at home, so she made the estate stay bigger) a decision at the hospital death-bed (don't turn on the TV, it costs $2.99 a day and he'll be gone soon) might well be enough. Neither route is one that this

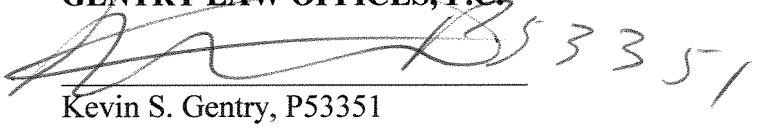
Court should take. As uncomfortable as such things are here, they are bound to be all the more unworkable below. For a quite a while now, Michigan has held that there is a definite difference between things jointly worked on and things left alone (*Reeves*), and a whole lot of Michigan lawyers still cannot get *that* right. Now the Court of Appeals (in this era of instantly searchable "unpublished" opinions) has ushered us into an era where doing something (care), anything (being nice) or nothing (just not angering the rich old fellow) may be enough, and where "improvement" means what would have been there anyway stayed there anyway. There are lots of good reasons for this case to have caught the Court's discerning eye, and just as many suggesting that the Court, having turned its attention to this case, should not let it pass uncorrected.

RELIEF REQUESTED

WHEREFORE, Plaintiff-Appellant, **KENNETH R. DEYO**, respectfully requests that this Honorable Court grant leave or peremptorily reverse the May 25, 2004 decision of the Court of Appeals and the November 19, 2002, Judgment of Divorce of the Livingston Circuit Court and grant him such other relief as is consistent with equity and good conscience.

Respectfully Submitted:

GENTRY LAW OFFICES, P.C.



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